

No. 83-1138

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1983

GARY J. PEED
and
JAMES C. CODDINGTON,
Petitioners,
v.
UNITED STATES OF AMERICA
Respondents.

PETITIONERS' REPLY TO OPPOSITION

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QUESTIONS PRESENTED

I. Are mid-trial chambers conferences between a juror and a trial judge, regarding the juror's apprehension for his safety caused by third party contact with the jury critical stages of the trial, and the intentional exclusion of the Petitioners and Petitioners' counsel from such proceedings a violation of the Petitioners' right to be present under Fed. R. Crim. P. 43(a) and their Sixth Amendment right to counsel?

II. Is the Burden on the Government to prove violations of Petitioners' right to be present and right to counsel during mid-trial *ex parte* juror-judge substantive communications harmless beyond a reasonable doubt pursuant to *Remmer v. United States*, *Smith v. Phillips* and *Rushen v. Spain*?

III. Can a due process post-trial hearing authorized in *Remmer v. United States* and *Smith v. Phillips* be conducted without adequate notice, without an impartial fact finder and without the right to summon material witnesses and evidence?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
STATEMENT OF THE CASE	1
ARGUMENT	2
CONCLUSION	7

TABLE OF AUTHORITIES

CASES:	Page
<i>Remmer v. United States</i> , 347 U.S. 227 (1954)	i, 5
<i>Rogers v. United States</i> , 422 U.S. 35 (1975)	4
<i>Rushen v. Spain</i> , 464 U.S. —, (Slip op. Dec. 12, 1983)	i, 3
<i>Smith v. Phillips</i> , 455 U.S. 209 (1982)	i, 5
<i>United States v. Ronder</i> , 639 F.2d 931 (2d Cir. 1981) .	4
<i>United States v. Wood</i> , 299 U.S. 123 (1936)	6

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**STATEMENT OF THE CASE
OMITTED BY GOVERNMENT**

There were three extraneous contacts with jurors during the course of Petitioners' and co-defendants' trial.

During their case in chief, as the jury was exiting the courthouse after the sixth day of Petitioners and four co-defendants' trial, at least five jurors (9/30 TR 102 Ap. 41a, 122, Ap. 44A) saw an unidentified individual seated in a parked automobile across from the courthouse aiming a camera equipped with a 12"-15" telephoto lens at them (9/30 TR 116 Ap. 43a).

Juror Bryant Deaton later testified that because of the nature of the trial, he and the other jurors were "scared," feared for their personal safety and believed the defendants were having pictures taken of the jury (9/30 TR 95, App. 37a-38a, 99, App. 38a-39a; 100 App. 39a-40a; 101, App. 40a).

Juror Deaton testified on cross-examination that given the nature of the case he was concerned that there might be some reason that someone would like to know something about the jurors or have pictures of them. He testified he was scared and concerned for his personal welfare (9/30 TR 93, App. 36a-37a).

Juror Deaton further testified he thought some of the other jurors were also concerned (9/30 TR 95, Ap. 38a). He testified that every member of the jury panel was aware of the fact that he (Deaton) and others had been photographed as they were leaving the courthouse, and knew he (Deaton) had taken down the license plate number of the car and reported it to the judge (9/30 TR 99, App. 38a-39a). Notwithstanding the trial judge's personal assurances, Juror Deaton could not testify whether the other jurors were as assured as he was (9/30 TR 100, App. 39a).

Further cross-examination of Juror Deaton indicated that he (Deaton) believed the perpetrator(s) of the photographing incident to be the Petitioners and co-defendants (9/30 TR 100, 101, App. 40a).

Juror Deaton testified that his fear abided with him overnight (9/30 TR 100, 101, App. 40a). He testified that from September 1, 1982, the date of the incident, until September 30, 1982, the date of the post-trial hearing, he (Juror Deaton) believed the photographing incident had something to do with the case; the trial judge never informed Juror Deaton otherwise (9/30 TR 106, 107, App. 42a).

ARGUMENT

The Government's response to Peed's and Coddington's Petition for Certiorari illustrates the present confusion and immediate need for this Court to clarify the

separate but interrelated constitutional rights of the Petitioners: (1) to be present at critical stages of trial; (2) to be represented by counsel at critical stages of trial; (3) to a trial by an impartial jury; and (4) to a full and adequate post-trial hearing on jury bias.

The Government incorrectly characterizes "the essence" of Petitioners' claims as a plea for recognition of a due process right to a mid-trial hearing. (Brief in Opposition, n. 6) Petitioners Peed and Coddington make no such claim. The *true* "essence" of Petitioners' claim is that once the trial judge elected to engage in mid-trial communications with a juror, such communications were a critical stage of the proceedings at which petitioners were entitled to be present and represented by counsel.

This Court referred to such rights as "fundamental" in *Rushen v. Spain*, 464 U.S. ___, (Slip op. Dec. 12, 1983) Petitioners ask for clarification of the issue left unresolved in *Rushen*, to-wit; whether such fundamental rights are of a constitutional dimension. Nowhere in the Brief in Opposition does the Government address the Petitioners' right to be present or the right to counsel during two separate substantive communications between judge and juror.

The Government incorrectly states that "the district court's factual findings regarding its *ex parte* communications with Juror Deaton and their effect on juror impartiality are entitled to a presumption of correctness." (Brief in Opposition, n. 7) No factual findings were made regarding the trial judge's *ex parte* communications with the juror, hence no presumption of correctness can be afforded the District Court's factual findings. The *only* issue addressed by the District Court at the post-trial hearing was whether the photographing incident affected Juror Deaton. The trial judge did not address the Peti-

tioners' right to be present, to be represented by counsel, and participate during the *ex parte* communications and instructions between judge and juror. (83-1138 Pet. 15-21)

An illustration of the necessity of the right to counsel and the need to participate during instructions to, and communications with, the jury during trial is the inaccurate description of the trial judge's and Juror Deaton's versions of their *ex parte* communications (Brief in Opposition, at 6). At first blush one would think both the judge and the juror remembered the communication similarly, but when more closely analyzed one realizes that Juror Deaton simply does not recall the judge saying that the photography had *not* been aimed at the jurors and that Juror Deaton should not consider it to have been directed at him or any other juror (contrast 83-1138 Pet. App. 20a with 31a and 42a). Petitioners contend that the correct constitutional procedure was established in *United States v. Ronder*, 639 F.2d 931 (2d Cir. 1981) where the Second Circuit identified four necessary components for the proper disposition of any communication between judge and jury.

Should this Court determine that Petitioners were denied their constitutional right to be present and represented by counsel, *the Government must prove* such violations to be harmless beyond a reasonable doubt. *Rushen v. Spain*, *id.* There has been no lower court determination that the government ever carried this burden, thus there are no "factual findings" that can be presumed to be correct.

The situation in this case is similar to *Rogers v. United States*, 422 U.S. 35, 40-41 (1975) in that the trial court did not hold any hearing on the effect of *its* intended communications with the jurors.

If deference is to be given to the factual findings below, the Government misstates the facts surrounding the other jurors' awareness of the photographing incident. The Government questions "if any of the other jurors saw the original photograph(ing)," (Brief in Opposition, at 11). The record clearly establishes that at least five jurors actually witnessed a camera being pointed at them and believed as Juror Deaton that their picture was being taken. (9/30 TR 102, 122, App. 41a-44a). It is thus inaccurate and a factual misrepresentation to state that "none of the other jurors experienced any period of doubt before the matter was resolved." (Brief in Opposition, at 11) The trial court's refusal to examine other jurors denied Petitioners an opportunity to inquire into the apprehension and fears experienced by the other jurors.

The Government apparently concedes that the *Remmer v. United States*, 347 U.S. 227 (1954) presumption of prejudice survives the holding in *Smith v. Phillips*, 455 U.S. 209 (1982) (Brief in Opposition, at 12) but goes onto assert that the presumption is inapplicable to the present case for three reasons: (1) the present case "involves no third party contact at all." (Brief in Opposition, at 12); (2) "the only 'outside influence' on Juror Deaton was created by the juror himself when he misinterpreted the photography incident" (Brief in Opposition, at 12); and (3) "the photography incident did not involve a matter pending before the jury." (Brief in Opposition, at 12)

The Government's presentation of the foregoing three points simply denies any logical basis. (1) Although there was no oral or written communication between the photographer and the jurors, third party contact plainly is not limited to oral or written communications. In *Remmer v. United States*, 347 U.S. 227 (1954) this Court applied the presumption of prejudice to "any private communication,

contact, or tampering, directly or indirectly, with a juror." (emphasis added). The pointing of a camera equipped with a 12"-15" telephoto lens from within a parked automobile at the jurors as they exited the courthouse certainly constitutes contact (direct or indirect) with jurors. Under the Government's reasoning, the pointing of a rifle at jurors would not involve third party contact. (2) The jurors' "misinterpretation" of the photographing incident cannot and does not negate its effect. As this Court noted in *United States v. Wood*, 299 U.S. 123, 149 (1936): "Impartiality is not a technical conception. It is a state of mind." Whether the jurors correctly or incorrectly perceived the photographing incident as a threat to their safety, their impartiality was affected. (3) The government's contention that the photographing incident "did not involve a matter pending before the jury" is erroneous since the record clearly indicates Petitioner Coddington was photographed. The photographing incident should not be perceived as communicating a substantive fact, but rather was perceived as a threat to the health, safety and welfare of the jurors should they return an undesired verdict. The perceived apprehension herein obviously involved a matter pending before the jury, the ultimate subject matter of the verdict to be returned.

The due process concept of notice requires that counsel be informed of the relevant factual situations and legal issues set forth, be allowed to develop additional facts, and have an opportunity to prepare legal argument for the court's consideration. The trial court's precipitous handling of the post trial hearing forced Petitioners' counsel to react spontaneously to previously undisclosed facts and thus denied Petitioners any opportunity to be heard in a meaningful fashion.

The Government's claim that no counsel at the hearing pressed the need to examine the 13 jurors is clearly a misstatement of the record. Petitioner Coddington's counsel did press such a need (83-1138 Pet. App. 50a).

The importance and relevancy of the questions presented by Petitioners Peed and Coddington go to the very basis and sanctity of our jury system and cannot be ignored or allowed to be further misconstrued by the Government.

The Government's inability to comprehend and address the questions presented by Petitioners brilliantly illuminates the urgent need for guidance and affirmative action which only can be given by this Court.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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